THE CIVIL OFFENSE

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The distinction between offenses *mala in se* and offenses *mala prohibita* was recognized at least as early as the fifteenth century.[1] It has been criticized repeatedly.[2] One hundred and thirty years ago the distinction was said to be one "not founded upon any sound principle" and which had "long since been exploded." [3] The Supreme Court, however, has shown that it is just as firmly entrenched in 1952 [4] as it was in 1495. And after all these years it was necessary to say: "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between" them.[5] This would call for little comment if it indicated no more than some areas of uncertainty along the actual boundary line, but the confusion goes far beyond that.

It may be helpful at the outset to indicate some of the more important differences in the results reached. The starting point seems to have been in regard to royal dispensation. The king could grant a subject permission to do an act which otherwise would be an offense *malum prohibitum* but not one that would be *malum in se*.[6] The second difference made its appearance in the development of the law of homicide. "If the act be unlawful," said Coke speaking of an act causing death unintentionally, "it is murder." [7] Hale pointed out that such a killing might be manslaughter only, depending upon the

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1. See the note by Chief Justice Fineux in Y.B. Mich. 11 Hen. VII, f. 11, pl. 35 (1495).

2. The distinction between *malum in se* and *malum prohibitum* "is now exploded." 1 WHARTON, CRIMINAL LAW § 157 n.10 (12th ed. 1932). "The distinction is perhaps of no practical utility. . . ." 1 McCLAIN, CRIMINAL LAW § 23 (1897). "But it is doubtful whether this distinction is now of any value. . . ." ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE 888 (26th ed. 1922). It is "no longer adhered to." Note, 5 U. OF PITT. L. REV. 58, 59 (1938). The *"mala in se—mala prohibita* classification is neither a logically possible nor a valid one." Note, 24 IND. L.J. 89, 97 (1948). But this has not been the view of the courts. For example: ". . . the well-recognized distinction between *mala in se* and *mala prohibita*." Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910).

3. Bensley v. Bignold, 5 B. & A. 335, 341, 106 Eng. Rep. 1214, 1216 (1822).

4. Morissette v. United States, 342 U.S. 246 (1952).

5. *Id.* at 260.

6. Fineux's note, *supra* note 1.

7. 3 Co. INST. *56.

nature of the offense, adding that it would be excusable homicide if the unlawful act "was but *malum prohibitum.*" [8] This has been accepted [9] and extended to analogous situations. Thus if one is knocked down unintentionally, and without criminal negligence, the mere fact that the contact resulted from an act *malum prohibitum* will not make it a criminal battery.[10] The difference most frequently encountered involves a more general problem of mens rea. There is no offense *malum in se* without some form of mens rea,[11] but the normal mens

8. 1 HALE, P.C. *475. Hale's phrase is "chance medley" but the context shows that he has reference to a killing by accident which does not involve criminal guilt.

9. State v. Horton, 139 N.C. 588, 51 S.E. 945 (1905). "Since it is *malum prohibitum,* not *malum in se,* for an unauthorized person to kill game in England contrary to the statutes, if, in unlawfully shooting at game, he accidently kills a man, it is no more criminal in him than if he were authorized." 1 BISHOP, CRIMINAL LAW § 332 (8th ed. 1892).

10. Commonwealth v. Adams, 114 Mass. 323 (1873).

11. "To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist." State v. Blue, 17 Utah 175, 181, 53 Pac. 978, 980 (1898). "There can be no crime, large or small, without an evil mind." 1 BISHOP, CRIMINAL LAW § 287 (8th ed. 1892). This requirement is included in a statutory crime even if not expressly mentioned. Leeman v. State, 35 Ark. 438 (1880); State v. Healy, 95 N.E.2d 244 (Ohio App. 1950); Regina v. Tolson, 23 Q.B.D. 168 (1889); Regina v. Page, 8 Car. & P. 122, 173 Eng. Rep. 425 (1837): "[I]t is an essential ingredient in a criminal offence that there should be some blameworthy condition of the mind, sometimes it is negligence, sometimes malice, sometimes guilty knowledge. Chisholm v. Doulton, 22 Q.B.D. 736, 741. This principle of the common law applies to statutory offences with this difference, that it is in the power of the Legislature, if it pleases, to punish offences although there was no blameworthy condition of mind about them." Commonwealth v. Ober, 286 Mass. 25, 30, 189 N.E. 601, 603 (1934). Although this statement does not limit the possibility of the statutory modification to offenses *mala prohibita,* the case was dealing with an extreme example of such an offense—parking overtime in a restricted district. In one form or another it has been repeated, time and again, that a statute may provide for the punishment of crime without regard to the knowledge or intent of the doer, but the cases have involved offenses *mala prohibita.* For example: State v. Sterrett, 35 Idaho 580, 207 Pac. 1071 (1922) (transportation of liquor); Troutner v. State, 17 Ariz. 506, 154 Pac. 1048 (1916) (sale of liquor); State v. Kelly, 54 Ohio St. 166, 43 N.E. 163 (1896) (pure food law); Commonwealth v. Emmons, 98 Mass. 6 (1867) (admitting minor to billiard room); State v. Dunn, 202 Iowa 1188, 211 N.W. 850 (1927) (possession of car with altered engine number); State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1934) (blue sky law); McKnight v. State, 171 Tenn. 574, 106 S.W.2d 556 (1937) (soliciting insurance on behalf of a foreign company not authorized to do business in the state); State v. Keller, 8 Idaho 699, 70 Pac. 1051 (1902) (sheep quarantine law).

On the other hand a statute authorizing the conviction of a true crime in the absence of mens rea would seem to violate the due process clause, and it has been so held. People v. Estreich, 272 App. Div. 698, 75 N.Y.S.2d 267 (1947), *aff'd without opinion,* 297 N.Y. 910, 79 N.E.2d 742 (1948); State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948). In the second case it is by no means clear that the New Mexico legislature intended to permit conviction of embezzlement where mens rea was lacking. There is much to be said for the view of the dissenting opinion that the mens rea requirement should be read into the statute, as is commonly done. But under the interpretation of the majority this statute, in terms, authorized conviction of embezzlement although the conversion was without wrongful intent and due entirely to an innocent and nonnegligent mistake of fact. If so, it very properly was held to be unconstitutional. Compare an Iowa case reversing a conviction under a statute with a mandatory penalty too severe for an offense *malum prohibitum.* The court held that it was not intended by this statute to convict one who had no guilty intent or knowledge. State v. Schultz, 50 N.W.2d 9 (Iowa 1951). The following

rea requirement is not a necessary ingredient of an offense *malum prohibitum*.[12] The typical case involves a mistake of fact. An act has been done under an innocent and nonnegligent[13] mistake of fact of such a nature that what was done would have been not only lawful but entirely proper had the facts been as they were reasonably supposed to be. This is a complete defense to a prosecution for an offense

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statement is significant: "The constitution does not require that *scienter* be a necessary element of any law where an offense is *malum prohibitum*." People v. Johnson, 288 Ill. 442, 445, 123 N.E. 543, 545 (1919).

One of the well-known cases in this field is Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910). The syllabus says: "The statute of Minnesota punishing the cutting and removal of timber on state lands and imposing double and treble damages and fine and imprisonment for violation, whether the offense be wilful or not, is not unconstitutional under the due process clause of the Fourteenth Amendment. . . ." But the case did not hold that a defendant could be imprisoned for a violation due to an innocent mistake of fact. The proceeding was in the nature of a civil action for treble damages for cutting timber on state lands without a permit. And the only mistake, if any, was one of law. Had the court been satisfied that imprisonment could not be imposed for an innocent mistake of fact it would have upheld the constitutionality of the statute because it authorized punishment by (1) fine, (2) imprisonment or (3) both. *Id.* at 62 n.1. This would authorize the imposition of a fine in any case in which imprisonment would be improper.

12. See the cases involving offenses *mala prohibita* in the preceding note. It has been customary to speak of a category of offenses which, unless the wording of the statute provides otherwise, "require no *mens rea*." Sayre, *Public Welfare Offenses*, 33 COL. L. REV. 55, 62 (1933). Kenny makes a more cautious statement: "Conversely, some less complex and less guilty state of mind than the usual *mens rea* is sometimes by statutory enactment—but only once by the common law—made sufficient for the mental element in criminal guilt." Kenny, Outlines of Criminal Law 44 (14th ed. 1933). He seems to have in mind that since such a statute requires each at his peril to know that what he is doing is not a violation of its requirement, any failure so to know involves some degree of negligence. But it is difficult to ascribe negligence where no degree of care will suffice.

On the other hand there are some indications that there may be the trace of a mens res requirement in such offenses. An English statute providing a penalty for the killing of a house pigeon was placed in the category we are here considering although it might have received a different interpretation. The innocent belief that the pigeon was a wild one was held to be no defense. Horton v. Gwynne, [1921] 2 K.B. 661. But a farmer who shot a pigeon feeding upon his land, in order to protect his crop, was not guilty. Taylor v. Newman, 4 B. & S. 89, 122 Eng. Rep. 393 (1863). It was said, *obiter*, that exceeding the speed limit under compulsion would be an excuse. Goodwin v. State, 63 Tex. Cr. 140, 142, 138 S.W. 399, 400 (1911). The failure to supply a separate coach for colored passengers, as required by statute, was excused where the failure was due to a landslide which delayed the coach that was to have been provided for that purpose, although it would have been possible to have had a spare coach in reserve. Chicago & Ohio R.R. v. Commonwealth, 119 Ky. 519, 84 S.W. 566 (1905). In other words the so-called "strict liability" means much more strict than usual, but it does not mean that the doing of the prohibited act requires conviction under any and all circumstances. To avoid the necessity of considering here whether such cases do or do not indicate a trace of mens rea in these offenses, the text makes use of the phrase "the normal mens rea requirement."

13. A mistake of fact may be sufficient to establish innocence of the offense charged, even if it was due to negligence, in some cases. One does not commit larceny by carrying away the chattel of another in the mistaken belief that it is his own, no matter how great may have been the fault leading to this belief, if the belief itself is genuine. Regina v. Halford, 11 Cox C. C. 88 (1868); People v. Devine, 95 Cal. 227, 30 Pac. 378 (1892); Dean v. State, 41 Fla. 291, 26 So. 638 (1899). The use of the word "nonnegligent" in the text was because of a desire to make the statement extreme.

malum in se.[14] It is no defense to a prosecution for an offense *malum prohibitum*[15] unless the wording of the particular statute has imposed a mens rea requirement,—as by providing a penalty for such an act only if "knowingly" committed.[16]

Another important difference between the two types of offense is in connection with respondeat superior. There can be no conviction of an offense *malum in se* upon this basis,[17] but it is quite otherwise if

14. Gordon v. State, 52 Ala. 308 (1875). Commonwealth v. Presby, 14 Gray 65 (Mass. 1860); Commonwealth v. Power, 7 Metc. 596 (Mass. 1844); State v. McDonald, 7 Mo. App. 510 (1879).

15. Smith v. State, 223 Ala. 346, 136 So. 270 (1931); People v. Johnson, 288 Ill. 442, 123 N.E. 543 (1919); McCutcheon v. People, 69 Ill. 601 (1873); Commonwealth v. Raymond, 97 Mass. 567 (1867); Commonwealth v. Farren, 91 Mass. 489 (1864); People v. Snowberger, 113 Mich. 86, 71 N.W. 497 (1897); Commonwealth v. Weiss, 139 Pa. 247, 21 Atl. 10 (1891); State v. Whitman, 52 S.D. 91, 216 N.W. 858 (1927); Welch v. State, 145 Wis. 86, 129 N.W. 656 (1911); State v. Hartfiel, 24 Wis. 60 (1869); Regina v. Woodrow, 15 M. & W. 404, 153 Eng. Rep. 907 (1846).

16. See, for example, 18 U.S.C. § 835 (transportation of explosives, etc.): "Whoever knowingly violates any such regulation. . . ."

"In all civil actions for a penalty or forfeiture the liability shall be absolute, and lack of scienter shall not be a defense unless the word 'knowingly' or some similar word is used." Gausewitz, *Criminal Law—Reclassification of Certain Offenses as Civil Instead of Criminal*, 12 WIS. L. REV. 365, 366 (1937).

It is particularly significant when some such word as "knowingly" is used in one section of a statute and omitted from another. Commonwealth v. Raymond, 97 Mass. 567 (1867); People v. Snowberger, 113 Mich. 86, 71 N.W. 497 (1897). Or when such a word, originally in the statute, has been removed by amendment. State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1934). One interesting suggestion is that what would otherwise be *malum prohibitum* becomes *malum in se* if the wording of the statute requires a wrongful intent for conviction. United States v. Boyce Motor Lines, 188 F.2d 889, 891 (3d Cir. 1951); affirmed, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952).

17. The leading case is Rex v. Huggins, 2 Ld. Raym. 1574, 92 Eng. Rep. 518 (1730). This case "nipped in the bud" any thought of extending to criminal jurisprudence the doctrine of *respondeat superior* then being developed in the law of torts. One of the best discussions of this entire field is, Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930). There are many instances in which the employer is criminally responsible for the misdeed of his employee. This is true whenever it can be shown to have been done "(1) by authorization, procurement, incitation or moral encouragement, or (2) by knowledge plus acquiescence." *Id.* at 702. If the employer is present when the employee is doing his work in such a manner as to endanger the lives of others the circumstances may be such that the former will be guilty of criminal negligence if he fails to direct the latter to use more care. Moreland v. State, 164 Ga. 467, 139 S.E. 77 (1927). If the work involved requires skill to avoid danger to others the employment of an incompetent person may itself be under such circumstances as to constitute criminal negligence. Compare Regina v. Lowe, 3 Car. & K. 123 (1850). This was not strictly an employment case and was grounded upon "neglect of duty." Had the boy been regularly employed for that task the employment itself would have involved criminal negligence. The circumstances may be such that the law requires a very high degree of care in the supervision of the work of employees, or else in the employment itself so that criminal responsibility may be based upon an inexcusable failure in this regard. On this basis the owner of a newspaper may be guilty of libel for something that appeared in the pages without his knowledge. See The Queen v. Holbrook, 4 Q.B.D. 42, 50 (1878); Commonwealth v. Morgan, 107 Mass. 199, 203-4 (1871). The original English rule held the proprietor of a newspaper criminally liable for libel on the basis of respondeat superior. Rex v. Walter, 3 Esp. 21 (1799). This was quite unsound and was changed by statute. 6 & 7 VICT. c. 96 (1843).

the prosecution is for an offense *malum prohibitum*.[18] In fact guilt of such an offense can be established by proof of the prohibited act by defendant's employee in the course of defendant's business and within the scope of the employment, even if it was contrary to his express instructions.[19] The degree of proof needed for conviction also requires attention. Evidence beyond a reasonable doubt is required for conviction of an offense *malum in se*[20] whereas a preponderance of the evidence will support a conviction of an offense *malum prohibitum*.[21] Another difference is found in the conspiracy cases. If two or more agree to do an act which constitutes an offense *malum in se* they are guilty of conspiracy whether they do or do not know

18. Meigs v. State, 94 Fla. 809, 114 So. 448 (1927); State v. Probasco, 62 Iowa 400, 17 N.W. 607 (1883); DeZarn v. Commonwealth, 195 Ky. 686, 243 S.W. 921 (1922); Commonwealth v. Sacks, 214 Mass. 72, 100 N.E. 1019 (1913); Commonwealth v. Warren, 160 Mass. 533, 36 N.E. 308 (1894); State v. Sobelman, 199 Minn. 232, 271 N.W. 484 (1937); Commonwealth v. Jackson, 146 Pa. Super. 328, 22 A.2d 299 (1941), *aff'd*, 345 Pa. 456, 28 A.2d 894 (1942); Barnes v. Akroyd, L.R. 7 Q.B. 474 (1872). The opinions at times contain language suggestive of a requirement of a high degree of care on the part of the employer to avoid the forbidden act. This suggestion disappears when it is explained that he must avoid it at his peril. See People v. Roby, 52 Mich. 577, 18 N.W. 365 (1884). One of the best examples of a similar application to the general mens rea problem is found in one of the most outstanding cases in the field. "[T]he policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells. . . . Its manifest purpose is to require every person dealing in drugs to ascertain at his peril. . . ." United States v. Balint, 258 U.S. 250, 252-4 (1922).

19. Groff v. State, 171 Ind. 547, 85 N.E. 769 (1908); State v. Brown, 73 Ore. 325, 144 Pac. 444 (1914); State v. Schull, 66 S.D. 102, 279 N.W. 241 (1938); State v. Cray, 85 Vt. 99, 81 Atl. 450 (1911).

20. Quinn v. State, 106 Miss. 844, 64 So. 738 (1914). "[I]n a strictly criminal prosecution the jury may not return a verdict against the defendant unless the evidence establishes his guilt beyond a reasonable doubt. . . ." United States v. Regan, 232 U.S. 37, 47-48 (1914).

21. United States v. Regan, 232 U.S. 37 (1914); Proctor v. People, 24 Ill. App. 599 (1887). Roberge v. Burnham, 124 Mass. 277 (1878); People v. Briggs, 114 N.Y. 56, 20 N.E. 820 (1889). "I think that the evidence which would support a civil action would be sufficient to support an indictment" [for nuisance]. Per Mellor, J., in The Queen v. Stephens, L.R. 1 Q.B. 702, 710 (1866). Some of the cases holding a preponderance of the evidence sufficient have emphasized that the proscution was under a statute authorizing the penalty to be recovered in a civil proceeding. United States v. Regan, 232 U.S. 37, 48 (1914); State v. Chicago, M. & St. P. Ry., 122 Iowa 22, 25-26, 96 N.W. 904, 905 (1903). But the reason such a statute does not violate constitutional safeguards is that the proceeding would have been civil in substance even if it had remained criminal in form. "It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding. . . ." Per Mellor, J. *supra* at 708. Cases can be found which speak of proof beyond a reasonable doubt in this field. *E.g.*, Chaffee & Co. v. United States, 18 Wall. 516 (1873). But this is usually because the point was not considered. Hawloetz v. Kass, 25 Fed. 765 (1885). If the penalty is too extreme to be appropriate for an offense *malum prohibitum* the proceeding is criminal in substance as well as in form and proof beyond a reasonable doubt is required for conviction. United States v. Burdett, 9 Pet. 682 (U.S. 1835).

See a note, *Suit for a Statutory Penalty as a Civil or Criminal Prosecution*, 27 L.R.A. (N.S.) 739 (1910).

Acquittal in a prosecution for wilful attempt to evade the payment of income tax does not bar a suit to recover a penalty for insufficient payment because of the difference in the quantum of proof. Helvering v. Mitchell, 303 U.S. 391 (1938).

that the law provides for the punishment of such an act.[22] But if the agreement is to commit an act which is *malum prohibitum* they are not guilty of conspiracy if what is to be done would be proper except for the statute and they do not know that the act is prohibited by law.[23]

One additional difference seems to be of sufficient importance to warrant inclusion here. If the offense is *malum in se* condonation by the injured party will not bar a public prosecution.[24] An offense *malum prohibitum* will more frequently affect the public at large than some particular individual, but if it is of such a nature as to injure a particular person a prosecution therefor can be completely barred by his condonation.[25]

22. Since the premise is that the thing agreed to be done is wrong in itself the agreement is with mens rea whether the act is known to be punishable or not. In fact it is possible to have a conspiracy although the wrongful act agreed upon is not itself a punishable offense. Commonwealth v. Waterman, 122 Mass. 43 (1877). "Thus a conspiracy to cheat by false pretenses without false tokens, when a cheat by such pretenses by one person was not punishable, was held indictable. . . ." *Id.* at 57.

23. Landen v. United States, 290 Fed. 75 (6th Cir. 1924); Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935). "Persons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators because it turns out that the contemplated act was prohibited by statute." People v. Powell, 63 N.Y. 88, 92 (1875). "The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited, in ignorance of the prohibition." People v. Flack, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891).

If, however, a corrupt motive is established it is not necessary to show that the conspirators had knowledge of the law even if it is merely *malum prohibitum.* Cruz v. United States, 106 F.2d 828 (10th Cir. 1939).

24. State v. Dye, 148 Kan. 421, 83 P.2d 113 (1938); State v. Dejean, 159 La. 900, 106 So. 374 (1925); Cook v. Commonwealth, 178 Va. 251, 16 S.E. 635 (1941). A mother cannot condone the crime of arson committed when her son burned her barn. State v. Craig, 124 Kan. 340, 259 Pac. 802 (1927). Although larceny involves a taking without consent, the victim cannot purge the crime by a consent given after the larceny has been committed. State v. Thomas, 318 Mo. 605, 300 S.W. 823 (1927). A settlement which includes the compromise of a crime is void as far as it relates to the crime and constitutes no defense to a prosecution. *See* State v. Kiewel, 173 Minn. 473, 217 N.W. 598 (1928).

There are no constitutional objections to a change of this rule by statute because any such change would work to the advantage of the offender. And a number of such changes have been made. It is sometimes provided, for example, that no prosecution for adultery shall be brought except upon complaint of the injured spouse. IOWA CODE § 702.1 (1950). Perhaps the most common provision for condonation is a statutory provision that intermarriage of the parties shall bar a prosecution for seduction. CAL. PEN. CODE § 269 (1949); ILL. REV. STAT. c. 38 § 537 (1947); N.Y. PEN. LAW § 2176. Much rarer is an enactment under which such marriage will bar a prosecution for rape. ILL. REV. STAT. c. 38, § 490 (1947). Not infrequently there is statutory authority for the compromise of certain misdemeanors. CAL. PEN. CODE § 1377 (1949). For an elaborate consideration of this field see Miller, *The Compromise of Criminal Cases,* 1 So. CALIF. L. REV. 1 (1927).

While any such provision tends to work to the advantage of the offender, the legislators have had in mind the interests of the injured victim.

25. Holsey v. State, 4 Ga. App. 453, 61 S.E. 836 (1908). "This ruling is to be taken, however, with the understanding that the principle is applicable only in that class of cases where the offense involves no crime against society or morals. . . ." *Id.* at 454-5. The court was referring to condonation without statutory authorization. See the preceding note.

Three misconceptions are to be noted and avoided. The first stems from a misunderstanding of the terms themselves. As customarily used these phrases are mutually exclusive. An offense *malum prohibitum* is not a wrong which is prohibited, but something which is wrong *only* in the sense that it is against the law.[26] This is emphasized at times by such phrases as "*malum prohibitum* only" [27] or "but *malum prohibitum*," [28] although it is understood without any such qualification. A failure to understand this usage of the terms has led some to assume that all statutory additions to the common law of crimes are *mala prohibita*.[29] One writer emphasized his confusion by speaking of embezzlement as *malum prohibitum*.[30] This assumption is utterly without foundation. An act may be *malum in se* although no punishment is provided by law.[31] If this defect is corrected by appropriate legislation, what previously was *malum in se* does not cease to be so by reason of having been defined and made punishable by law.

The second misconception is much more broad in its nature. It is the notion that the whole mens rea concept of the criminal law is on the wane and may be expected to disappear entirely in the near future.[32] This is due to the failure to distinguish between *malum in se* and *malum prohibitum*. In recent years there has been a tremendous increase in the latter type of offense. And with this there has been a corresponding increase in the number of convictions without the need of establishing the normal mens rea requirement. But as far as

26. "Acts *mala prohibita* include any matter forbidden or commanded by statute, but not otherwise wrong." Commonwealth v. Adams, 114 Mass. 323, 324 (1873). "But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se*, but *mala prohibita* merely, without any intermixture of moral guilt, . . ." 1 BL. COMM. *57.

27. Commonwealth v. Benesch, 290 Mass. 125, 135, 194 N.E. 905, 910 (1935).

28. 1 HALE, P.C. *475.

Sometimes a different emphasis is found. For example: "To sell it is not only *malum in see* [sic], but *malum prohibitum*." State v. Keever, 177 N.C. 114, 117, 97 S.E. 727, 728 (1919). The misprint is not found in the Southeastern.

29. Levitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, 587 (1923). "The distinction between *mala in se* and *mala prohibita* is drawn on the basis of whether their origin is statutory." Note, 43 HARV. L. REV. 117, n.9 (1929).

A statutory offense is not *malum prohibitum* if a wrongful intent is required for conviction. United States v. Boyce Motor Lines, 188 F.2d 889 (3d Cir. 1951); *aff'd*, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952).

30. Levitt, *supra* note 29. Embezzlement is *malum in se*. State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948).

31. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875). And see State v. Audette, 81 Vt. 400, 403, 70 Atl. 833, 834 (1908). These cases are discussed *infra* in the text.

Suicide or attempted suicide is not punished under the laws of Massachusetts, but any such act is unlawful and *malum in se*. Commonwealth v. Mink, 123 Mass. 422 (1877).

32. Levitt, *supra* note 29.

offenses *malum in se* are concerned the mens rea concept has lost none of its validity, as emphasized by the *Morissette* case,[33] and it is not likely to do so.[34]

The third misconception has resulted from a faulty analysis of the mistake of fact cases. Many of the convictions of offenses *mala prohibita* have involved a mistake of fact which was not an excuse although it would have been recognized as such in a prosecution for an offense *malum in se*. This has led some to jump to a faulty conclusion. They have started with the generalization of a bona fide and reasonable mistake of fact of such a nature that what was done would not constitute an offense if the facts were as supposed to be. And they have assumed that whenever this is not recognized as a defense it must be on the basis of *malum prohibitum*. On this assumption such an offense as statutory rape (carnal knowledge of a child) would be *malum prohibitum*. This conclusion misses the point entirely. In a prosecution for an offense *malum prohibitum*, if no special mens rea element has been added by the words of the statute, the position in this regard is extreme. A prohibited act done under an innocent and non-negligent mistake of fact will not be excused even if the mistake was of such a nature that what was done would have been unpunishable *and entirely proper*, had the facts been as they were reasonably supposed to be. The mistake as to the age of the girl in a statutory rape case is not this kind of mistake. The defendant's belief that the girl was over the age of consent may have been genuinely entertained and based upon very reasonable grounds. But the conviction is upheld on the ground that what was done would not have been proper even if the facts had been as he reasonably supposed them to be.[35] It is not within the scope of this article to comment on the Kinsey Report,[36] but the theory of the courts in these cases has been that mistaking the age of the girl in a statutory rape case is not an *innocent* mistake of fact. The mistake is not between an innocent act and a guilty one, but only in regard to the nature and extent of the wrong.[37]

One of the most helpful cases in this regard is *Regina v. Prince*,[38] although it involved a lesser offense. The statute made it a mis-

33. 342 U.S. 246 (1952).

34. Sayre, *supra* note 12.

35. The Iowa court, in distinguishing a case of this nature from the case of a man who has intercourse with a woman genuinely and reasonably believed by him to be his wife, said *obiter* of the latter: "In such a case there is no offense, for none was intended either in law or in morals." State v. Ruhl, 8 Iowa 447, 450 (1859).

36. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

37. State v. Houx, 109 Mo. 654, 19 S.W. 35 (1891).

38. L.R. 2 Cr. Cas. Res. 154 (1875).

demeanor to take an unmarried girl under the age of sixteen out of the possession and against the will of the father. The defendant had taken an unmarried girl of fourteen out of the possession of her father and against his will. She had gone very willingly. She appeared to be much older than sixteen and the defendant bona fide believed her to be eighteen. It was not suggested that this was merely *malum prohibitum*. Brett, J., with an able discussion of mens rea, argued that this reasonable mistake of fact was exculpatory.[39] The other judges upheld the conviction, but on the theory that the act would have been wrongful (although unpunishable) even if the girl actually had been eighteen. Blackburn, J., says, "he took her, knowing that he trespassed on the father's rights, and had no colour of excuse for so doing." [40] Bramwell, B., points out that the defendant would not be guilty if he had mistakenly believed that he had the father's consent to take the girl, for in such a case: "He would not know he was doing an act wrong in itself. . . ." [41] Denman, J., repeats that under other circumstances there might have been an excusable mistake of fact. But here: "He had wrongfully and knowingly violated the father's rights and against the father's will. And he cannot set up a legal defence by merely proving that he thought he was committing a different kind of a wrong from that which in fact he was committing." [42]

Another very enlightening case involved a conviction of adultery.[43] There was no dispute as to the facts. The defendant had had intercourse with a woman honestly and reasonably believed by him to be his wife. She was not, for the reason that she had a husband living and undivorced at the time of her purported marriage to defendant. That conviction was reversed for want of mens rea because of this innocent mistake of fact. The court very properly distinguished this case from the much more frequent claim of mistake of fact defense in an adultery case. This is where there has been intentionally illicit intercourse with a married woman reasonably supposed to be single. The reason for guilt in that situation was explained by the court as follows: "In such a case there is a measure of wrong in the act as the defendant understands it, and his ignorance of the fact that makes it a greater wrong will not relieve him from the legal penalty." [44] In another very different kind of case it was held that while conviction of

39. *Id.* at 155-170.
40. *Id.* at 170.
41. *Id.* at 175.
42. *Id.* at 179.
43. State v. Audette, 81 Vt. 400, 403, 70 Atl. 833, 834 (1908).
44. *Id.* at 403, 70 Atl. at 834.

the federal offense charged required proof of transportation of the kidnaped victim across a state boundary line, a mistake as to the location of the boundary was not exculpatory.[45]

The difference between the two types of offense seemed too obvious to Blackstone to require more than mention. One involved sin and the other did not. "The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and are therefore styled *mala in se,* such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature . . . .. But with regard to things in themselves indifferent the case is entirely altered . . . .. Now these prohibitory laws do not make the transgression a moral offence, or sin: . . . .." [46] To some, on the other hand, it has seemed insoluble. "[W]e would hesitate to concur in the soundness of the view that the unlawful act . . . must be *malum in se;* for, outside of those things which are condemned as evil or wrong by the Holy Scriptures, the question of what would be evil or wrong in its nature depends on individual conception or environment." [47]

Let this problem be examined in the light of the important differences mentioned. An offense *malum prohibitum,* to repeat, (1) is within the royal power of dispensation, (2) is not an "unlawful act" in the sense that it alone is sufficient to make a resulting homicide manslaughter (or a lesser injury criminal battery), (3) does not have the normal mens rea requirement (unless added by the words of the statute), (4) is within the application of respondeat superior, (5) requires only a preponderance of the evidence for conviction, is of such a nature that (6) an agreement to do such an act is not a conspiracy if it is not known to be against the law, and (7) condonation by the injured party is a complete bar to prosecution. These point irresistibly to just one conclusion: An offense *malum prohibitum* is *not a crime.* This was recognized by Blackstone [48] and others,[49] and has even the

45. United States v. Powell, 24 F. Supp. 160 (E.D. Tenn. 1938).

46. 1 BL. COMM. *54, 55, 58.

47. Silver v. State, 13 Ga. App. 722, 725, 79 S.E. 919, 921 (1913).

48. 1 BL. COMM. *54, 55, 58.

49. KENNY, OUTLINES OF CRIMINAL LAW 46 (14th ed. 1933); Gausewitz, *Criminal Law—Reclassification of Certain Offenses as Civil Instead of Criminal,* 12 WIS. L. REV. 365 (1937). Statutory crimes without mens rea "go counter to the very common-law conception of a crime." Pound, *The Law of the Land,* 62 AM. L. REV. 174, 182 (1928); 166 L.T. 208, 209 (1928). ". . . the enactments do not constitute the prohibited acts into crime. . . ." Regina v. Prince, L.R. 2 Cr. Cas. Res. 154, 163 (1875). ". . . that class of cases where the offense involves no crime against society or good morals. . . ." Holsey v. State, 4 Ga. App. 453, 61 S.E. 836, 845 (1908). ". . . our Constitution, in speaking of criminal prosecutions, does not refer to the enforcement of statutory penalties." Durham v. State, 117 Ind. 477, 481, 19 N.E. 327, 329 (1888). "An action to recover a forfeiture for violation

beginnings of statutory recognition.[50] It is clearly indicated by the persistent search for an appropriate label, such as "public torts," [51] "public welfare offenses," [52] "prohibitory laws," [53] "prohibited acts," [54] "regulatory offenses," [55] "police regulations," [56] "administrative misdemeanors," [57] "quasi crimes," [58] or "civil offenses." [59] There is no magic in a label, of course, but the one last named is preferred here because of the implied emphasis. It divides the field into "crimes" ("criminal offenses") and "civil offenses." Those who have regarded the *malum in se—malum prohibitum* dichotomy as unsound in nature or insoluble in the courts of men are unlikely so to regard a division separating crimes from civil offenses. Some difficulties will be encountered at the boundary line, without doubt, but there is nothing unusual about this.

Three tests have been suggested.[60] 1. If the offense was a common law offense other than a public nuisance it is a crime. The common law theory of a public nuisance is that it is "an anomalous offence where the prosecution is criminal merely in point of form, and in substance and effect is only a civil proceeding . . .."[61] This was the only common law offense in this category,[62] hence any other must be classed as a crime. 2. If the commission of the offense prima facie indicates a dangerous personality it is a crime.[63] 3. If the offense is popularly regarded as reprehensible it is a crime.[64] Conversely, if the offense was not known to the common law as such, its commission

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of an ordinance is thus a civil proceeding. . . ." South Milwaukee v. Schantzen, 258 Wis. 41, 43, 44 N.W.2d 628, 629 (1950).

The Internal Revenue Code provides both criminal and civil penalties. Helvering v. Mitchell, 303 U.S. 391 (1938).

50. "Except that the acts defined as traffic violations by the vehicle and traffic law heretofore or hereafter committed, are not crimes." N.Y. PEN. LAW § 2.

51. Note, *Public Torts,* 35 HARV. L. REV. 462 (1922).

52. Sayre, *supra* note 12.

53. 1 BL. COMM. *58.

54. Regina v. Prince, L.R. 2 Cr. Cas. Res. 154, 163 (1875).

55. Morissette v. United States, 72 Sup. Ct. 240, 247 (1952); Sayre, *Criminal Responsibility for the Acts of Another,* 43 HARV. L. REV. 689, 720 (1930).

56. Hammond v. King, 137 Iowa 548, 552, 114 N.W. 1062, 1063 (1908).

57. Kirchheimer, *Criminal Omissions,* 55 HARV. L. REV. 615, 636 (1942).

58. Stroud, *Mens Rea* 11 (1914); Fiorella v. Birmingham, 35 Ala. App. 384, 387, 48 So.2d 761, 764 (1950).

59. Gausewitz, *supra* note 49.

60. *Id.* at 367.

61. KENNY, OUTLINES OF CRIMINAL LAW 46 (14th ed. 1933).

62. *Ibid.*

63. This is important in regard to certain intentional violations to be mentioned presently—for example, the intentional sale of unwholesome food.

64. Quite apart from philosophical considerations of right or wrong, one who is free from fault should not be convicted of an offense *popularly regarded* as reprehensible.

does not indicate a dangerous personality and it is not popularly regarded as reprehensible, it should be classed as a civil offense. If the offense was a public nuisance at common law it is a civil offense. Statutory additions to the field must be measured by the other tests.

The failure to include here any mention of the penalty provided, as well as the similar omission at the outset, is not likely to escape attention. This is not an oversight as will be explained presently.

Before directing attention to that problem it is well to glance at the outline of the civil offense field. In a scholarly article Professor Sayre has shown the development of this field both in England and in the United States.[65] He finds eight general categories which he summarizes as follows:[66]

"(1) Illegal sales of intoxicating liquor;
  (a) sales of prohibited beverage;
  (b) sales to minors;
  (c) sales to habitual drunkards:
  (d) sales to Indians or other prohibited persons;
  (e) sales by methods prohibited by law;
(2) Sales of impure or adulterated food or drugs;
  (a) sales of adulterated or impure milk;
  (b) sales of adulterated butter or oleomargarine;
(3) Sales of misbranded articles;
(4) Violations of anti-narcotic acts;
(5) Criminal nuisances;
  (a) annoyances or injuries to the public health, safety, repose, or comfort;
  (b) obstructions of highways;
(6) Violations of traffic regulations;
(7) Violations of motor-vehicle laws;
(8) Violations of general police regulations, passed for the safety, health, or well-being of the community."

It may be well also to consider a specific case. A statute forbids anyone to drive a motor vehicle upon the public highway without an

65. Sayre, *Public Welfare Offenses,* 33 COL. L. REV. 55 (1933).
66. *Id.* at 73.

operator's license and provides a penalty for doing so. *D* had a fatal accident while driving a car on the public highway without an operator's license. Is this fact sufficient for conviction of manslaughter without any evidence of negligence [67] in the operation of the vehicle at the time of the accident? One court said no.[68] "In the instant case, it is true that the death would not have occurred if appellant's automobile had not been on the highway . . . but appellant's violation of the Vehicle Code had no direct relationship to the cause of death . . .. It cannot be logically concluded that the death 'happened in consequence of' such violation." [69] Another court said yes.[70] "The unlawful act was the driving of the automobile, not the failure to obtain a license." [71]

What about causation in such a case? Is there any direct causal connection between the unlawful act and the death? What was the unlawful act? It cannot be maintained that the only unlawful act involved was the failure to procure a license because this failure would have violated no law if there had been no driving. On the other hand driving a car on the public highway was not per se unlawful; it was unlawful only in the absence of a license. Both elements are involved. At the particular moment, however, *D* had no operator's license. Without that license his act of driving his car on the public highway was unlawful. That act of driving was the direct and immediate cause of death. The logic of the second case is unanswerable as a matter of causation. *D*'s act of driving that car on that occasion was in violation of law. *D*'s act of driving that car on that occasion was the direct and immediate cause of death. On the other hand, the court in the first case was not thinking about the causal connection between *D*'s *act* and the death. It was thinking in terms of the connection between the *unlawfulness* of *D*'s act and the death. This is just another way of saying that while *D* was violating the law his act was not such an "unlawful act" that a resulting death is manslaughter for this reason alone. Had the two courts been thinking, not in terms of causation, but in terms of the distinction between crimes and civil offenses they might have reached the same conclusion.

An additional question needs attention. Why was *D* without a license? The problem can be emphasized by giving two extreme

67. Whether the element which might change the result if present would be negligence or criminal negligence need not be considered here. See *The Law of Homicide*, 36 J. CRIM. L. & CRIMINOLOGY 392, 432-7 (1946).

68. Commonwealth v. Williams, 133 Pa. Super. 104, 1 A.2d 812 (1938).

69. *Id.* at 112, 1 A.2d at 816.

70. Commonwealth v. Romig, 22 Pa. D.&C. 341 (1934).

71. *Id.* at 342.

answers. (1) *D* had been a licensed operator for years and had unwittingly permitted the day to go by without obtaining the required renewal. (2) *D* had been refused a license (or his license had been revoked) because a driving test had shown that it would be quite unsafe for him to drive a motor car on the public highway. In the latter case those who refused to grant the license (or who revoked it) might well urge that they foresaw that this was exactly the kind of tragedy which was to be expected if *D* drove a car on the public highway, and that this was why he had no license. The fact that the prosecution is unable to produce evidence of negligence in the actual operation of the vehicle at the time of the accident may be because *D* is the only surviving witness. Or it may be due to other difficulties in procuring evidence rather than to the fact that there was no negligence. There is not only a causal connection between *D*'s act (which was unlawful) and the death in such a case. It also seems that this might be considered such an "unlawful act" that the resulting death should be manslaughter for this reason alone. If so, is it a civil offense rather than a crime?

Before answering this question it is important to seek the answer to another which has been avoided up to this point. This raises the problem which seems to have been the obstacle that has prevented a more satisfactory development of this part of the law. It has to do with the penalty to be provided for various violations. In listing the more important results attaching to the two types of violations, which we are now identifying by the labels "crimes" and "civil offenses," no mention was made of the difference in the penalty. This is because the penalty for the former may be very mild [72] whereas the present law seems to include instances in which the penalty for the latter is severe.[73] And a difference in the penalty was not included in the suggested tests partly because it was not included in the source from which they were repeated, and partly because it was thought desirable to postpone this consideration.

The punishment for crime need not always be severe. A contrary disposition may be indicated by the nature and extent of the crime, not to mention other possible considerations. On the other hand

72. If the penalty for petit larceny in a particular state is limited to a small fine the offense is nevertheless a crime rather than a civil offense.

73. United States v. Balint, 258 U.S. 250 (1922). The indictment was for a violation of the Narcotic Act. This was held to be a "regulatory measure" for which *scienter* was not a necessary element although the penalty might include imprisonment in the penitentiary.

State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1933). This was a violation of the "blue sky law" which provided a possible penalty of five years in the penitentiary. *Id.* at 868, 250 N.W. at 707.

the penalty for a civil offense should never be severe. The maximum should be a moderate fine or something of a comparable nature. It should never include imprisonment.[74] Here, of course, is where the real controversy will center. Any number will begin to think of the multitude of traffic accidents. Many die on the highways, they will point out, for every non-traffic homicide. More vigorous measures than have been taken in the past are needed to reduce this appalling slaughter, and it cannot be accomplished by limiting traffic penalties to small fines. Adulterated food or drugs, they may add, will involve only payment for more than is received in some instances, but may imperil the life of the user in others. And while a small fine may be adequate for a violation of the first type, they insist it is not for the second. This issue must be met squarely.

A rule providing that any traffic violation resulting in death would support a conviction of manslaughter would be quite unreasonable. The traffic violation does not have the normal mens rea requirement. Hence, to support manslaughter on this basis alone would leave manslaughter without the normal mens rea requirement. An illustration may be helpful. Assume a jurisdiction which has fixed speed limits and a particular zone in that jurisdiction where it is unlawful to exceed thirty miles an hour. *D* is driving there, scrupulously watching his speedometer to be sure it does not go over thirty. And it does not do so. But by reason of a mechanical defect, quite unknown to *D*, the speedometer registers only thirty when the car is traveling thirty-five. Let it be assumed further that *D* has just acquired the car and has had no opportunity to discover this defect. Despite *D*'s care to observe the law, and his innocent and nonnegligent mistake of fact, he is guilty of a traffic violation if his car actually travels thirty-five miles an hour in that zone. Add now that *D* is using as much care in his driving as in his effort to obey the speed law, and that despite his very careful driving he has a fatal traffic accident. Add also that although the car is being driven as carefully as could be expected at that speed, it is the additional five miles an hour which makes it impossible for the deceased, in a sudden and unexpected traffic emergency, to avoid being hit. Include in the assumption, for emphasis, that apart from the traffic violation the death would unquestionably be classed as innocent homicide resulting from a nonnegligent accident.

74. It has included imprisonment at times. The owner of a butcher shop was sentenced to ninety days in jail because of a short-weight sale by a clerk during the owner's absence despite undisputed evidence that the owner had not authorized such a sale or participated in any way. *In re* Marley, 29 Cal.2d 525, 175 P.2d 832 (1946). This was a habeas corpus proceeding. The court intimated that it might have refused to uphold the penalty imposed had the case come to it on appeal. The case is noted: 35 CALIF. L. REV. 583 (1947).

The fact of this traffic violation does not remove it from the category of innocent homicide.[75] Death by one entirely free from fault cannot be manslaughter. Under other facts the additional five miles an hour, at the time and place and under existing traffic conditions, might be just the difference between negligent driving and careful driving, but this was avoided in the first assumption made. If death resulted from criminally negligent driving it is manslaughter. Obviously the presence of an unintentional traffic violation would not make such a homicide innocent.[76] Now make a third assumption identical with the first except that there was no defect in the speedometer. *D* was intentionally exceeding the speed limit because he was in a hurry. How shall the homicide be classified?

Blackstone held the civil offense in very low esteem. It did not, in his view, place upon the individual any duty of compliance. He could obey the law and avoid the penalty or violate the law and pay the fine. Which election he made was a matter of indifference except to himself.[77] This is unsound. The theory that the individual is free to flout the law of the land—even such a law—is quite unacceptable. The driver who inadvertently leaves his car parked in a restricted zone beyond the permitted time has no legally recognized excuse. Even if he was misled as to the time by the stopping of his watch he is still subject to the fine. But his conscience is clear. He is just as good a citizen as if this oversight had not occurred. This is not quite true of the driver who intentionally parks overtime, whether it is because he thinks he can retake his car before it is actually "tagged," or thinks if he gets a ticket he can have it "fixed" or that the officers will be too busy ever actually to enforce it. And the driver who intentionally and habitually parks his car overtime certainly cannot claim a rating of one hundred per cent in the scale of citizenship. If all drivers regularly made such a practice the enforcement of the parking

75. Thompson v. State, 108 Fla. 370, 146 So. 201 (1933); State v. Cope, 204 N.C. 28, 167 S.E. 456 (1933); Weaver v. State, 185 Tenn. 276, 206 S.W.2d 293 (1947). A fatal traffic accident by one violating a municipal ordinance was held sufficient for manslaughter. State v. O'Mara, 105 Ohio St. 94, 136 N.E. 885 (1922). But this was overruled. Steele v. State, 121 Ohio St. 332, 168 N.E. 846 (1929). Language indicating that any traffic violation resulting in death is manslaughter is found at times in cases involving much more than a mere inadvertent violation. In a recent case in which such language is found the conviction was for manslaughter "committed by driving an automobile while under the influence of intoxicating liquor, in a reckless careless and negligent manner." State v. Scott, 239 P.2d 258 (Idaho 1952). Violation of the speed law, by one charged with manslaughter, is a circumstance to be considered with all of the other evidence on the issue of criminal negligence. Minardo v. State, 204 Ind. 422, 183 N.E. 548 (1932).

76. State v. McLean, 234 N.C. 283, 67 S.E.2d 75 (1951).

77. "But in these cases the alternative is offered to every man; 'either abstain from this, or submit to such a penalty:' and his conscience will be clear, whichever side of the alternative he thinks proper to embrace." 1 BL. COMM. *58.

law probably would break down entirely. The fact that it would be a matter of indifference how long the car remained there in the absence of statute does not leave it a matter of indifference after the regulatory enactment.

It is in connection with other types of regulatory measures, however, that the intentional violation becomes seriously anti-social. One who intentionally violates a statute designed for the protection of life or property is willing to risk a danger which the law seeks to prevent. And this in itself has been said to be sufficient for criminal negligence.[78] This may be the solution to the problem.

There seems to have been a tacit assumption that the areas occupied by crime and by civil offense must be mutually exclusive. This is not necessarily so and a permitted overlapping would provide a much better basis for enforcement. Suppose, for example, bread containing a deleterious ingredient has been sold. If this violates a regulatory law the seller is guilty of a civil offense even if he had no knowledge of this fact. If he was a retailer who sold the bread just as he bought it, not knowing or having any reason to know of the harmful presence, he may be convicted despite this innocent and reasonable mistake of fact. But he should not be imprisoned for this reason. On the other hand, if he sold the bread with knowledge of the unwholesome content a sentence of imprisonment might be quite appropriate. In the laws governing the sale of food and drugs and those governing traffic, for example, there are many provisions of such a nature that a violation should be a civil offense if unintentional, and without negligence, but a crime if intentional (and also perhaps if the result of criminal negligence). If it is a civil offense the penalty should not exceed a moderate fine, but there is no such limitation if it is a crime. And if, as is true in many of these laws, the penalty may be either, this should be understood to be an overlapping provision with imprisonment authorized only for such violations as fall within the category of crime.

What has come to be one of the leading cases in the field is *United States v. Balint*.[79] The indictment charged a violation of the Narcotic Act. The question was whether the indictment was demurrable for want of an averment that defendants sold the inhibited drugs knowing them to be such. The obvious answer was no. Even on the premise that an innocent and nonnegligent mistake of fact would constitute an excuse, the prosecution was not required to plead and prove

78. "An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." State v. Cope, 204 N.C. 28, 31, 167 S.E. 456, 458 (1932).

79. 258 U.S. 250 (1922).

the absence of such a mistake. This would have been a matter to be shown in defense if it had been recognized as exculpatory in such a case. The court, however, emphasized that such a mistake would not prevent conviction for this offense. And this has caused much confusion since the statute authorized a penitentiary sentence. Had the court added that the penalty must be limited to a fine if the sale resulted from an innocent and nonnegligent mistake of fact, we would be thirty years ahead in the development of this part of the law.

Without doubt judges usually have avoided imposing imprisonment without proof of the normal mens rea requirement.[80] But a conviction may carry a stigma even without imprisonment. An Iowa case involved a violation of the "blue sky law." [81] Defendant was charged with having filed a false statement of the financial condition of his company. He was convicted under a charge that the filing of a statement which was untrue in fact was sufficient. This was upheld on the ground that the word "false" in the statute means merely "untrue," because the words "knowingly" and "wilfully" which appeared in an earlier statute had been omitted from this. But even if the defendant was required to pay only a small fine, rather than to serve the possible five years in the penitentiary authorized by the statute,[82] he had the record of a felony conviction because of the definition in that state.[83] And appearances would seem to show conviction of a very serious misdemeanor even under a more reasonable definition of felony.[84] In any such case it should be possible for the record to show that the conviction was for a civil offense if the violation resulted from an innocent mistake of fact.

Assumption of mutual exclusiveness has clouded the issues involved. There is no thought of complete merger. It is not suggested that each prohibited act be deemed a civil offense if without the normal mens rea requirement, but a crime if that element is present. Many violations will be exclusively in one category or the other. But in the case of regulatory laws passed for the protection of person or

80. Imprisonment has been imposed without it. *See* note 74 *supra.*

81. State v. Dobry, 217 Iowa 858, 250 N.W. 702 (1933).

82. *Id.* at 868, 250 N.W. at 707.

83. "A felony is a public offense which may be punished with death, or which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory." IOWA CODE § 687.2 (1950).

84. Some statutes do not apply the felony label, after conviction, if a prison sentence was not pronounced. *E.g.:* "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority. . . ." CAL. PEN. CODE § 17 (1949).

property a violation should be a crime or a civil offense depending upon the presence or absence of intent or criminal negligence.

It has been pointed out that what otherwise would be a civil offense is a true crime if the statute requires a wrongful intent for conviction.[85] It has been held that a penalty too severe for anything other than a true crime cannot properly be imposed upon a blameless person by the application of respondeat superior, even if this seems to be within the words of the statute.[86] Legislative bodies have begun to recognize the existence of some offenses which are not crimes,[87] and the fact that the more severe penalties should not be applied where the normal mens rea requirement is lacking.[88] The next logical step would seem to be the frank recognition of two very different types of transgression, with a limited area in which the violation of a particular section of the code will be either a crime or a civil offense depending upon the presence or absence of the normal mens rea requirement for criminal guilt. It is desirable to have this clearly stated in the statutes themselves.[89] The courts, however, might well give such an interpretation to enactments not so worded if the safety of life or limb is involved.

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85. A violation is not *malum prohibitum* if the statute requires a specific wrongful intent. United States v. Boyce Motor Lines, 188 F. 2d 889, 891 (3d Cir. 1951), *aff'd*, Boyce Motor Lines v. United States, 72 Sup. Ct. 329 (1952).

86. State v. Schultz, 50 N.W.2d 9 (Iowa 1951). The statute prohibited the sale of beer to a minor on the premises of a class "B" permit holder. A violation by the holder of such a permit or by any of his agents or employees was made a mandatory ground for revocation of the permit. The evidence was clear that a boy of sixteen bought eighteen bottles of beer in *D's* store and that *D* had a class "B" permit. The evidence also was clear that *D* was out of the city at the time and there was no evidence suggesting that he knew of this transaction or that it was made under his direction. *D* was convicted but the conviction was reversed on the ground that it was not within the intent of the statute to convict a permit holder who had no guilty intent or guilty knowledge.

Compare United States v. Burdett, 9 Pet. 682 (U.S. 1835). In this case it was held that a prosecution to enforce the forfeiture of a vessel and all that pertains thereto for a violation of the revenue law was not in the nature of a civil action and that conviction required proof beyond a reasonable doubt.

87. See note 2 *supra*. What seems to be the boldest step in this direction is that being proposed in Wisconsin. See Gauzewitz, *supra* note 16.

88. See, for example, the statute quoted in Shelvin-Carpenter Co. v. Minnesota, 218 U.S. 57, 62 n.1 (1910). This provided punishment by fine or by imprisonment, "or by both, in case the trespass is adjudged to have been wilful." This is a groping in the right direction but the provision should have limited the penalty to a fine "unless the trespass is adjudged to have been wilful."

89. Compare the statute involved in a recent decision. Boyce Motor Lines, Inc. v. United States, 72 Sup. Ct. 329 (1952). The statute is 18 U.S.C. § 835 (1948). It deals with the transportation of explosives and inflammables and hence might well be in the civil offense category. But it provides no penalty for a violation due to an innocent mistake of fact. "Whoever knowingly violates any regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." Had the statute provided also for a moderate fine in case of unintentional violation it would have covered both categories—crime and civil offense.

This would permit adoption of what is properly the starting point in the effort to determine whether a particular violation is a crime or a civil offense. If the penalty includes imprisonment it is a crime;[90] if it does not the offense may be either and the other tests are to be applied.[91] And it would promote the recognition of certain important differences in the proceedings,[92] such as retrial for error prejudicial to the government,[93] directed verdict in favor of the government,[94] statute of limitations,[95] trial without jury,[96] and confrontation.[97]

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90. An early Wisconsin case pointed out that whether imprisonment is or is not included as a penalty determines whether the violation is a crime or a civil offense if it is in the area which might be the latter. State v. Hayden, 32 Wis. 663 (1873).

In the overlapping area a finding of wilful violation (or perhaps criminal negligence in this regard) would authorize conviction of a crime. A finding of violation without this element would support conviction of a civil offense. A finding of neither would require an acquittal.

91. The three tests suggested in the text at note 60 *supra.*

92. The degree of proof was mentioned in the text at notes 20 and 21 *supra.* See note 21 *supra.* If the prosecution is for a violation which, as suggested here, may be either a crime or a civil offense depending upon the presence or absence of the normal mens rea requirement, the distinction would require attention at every point. Conviction of the *crime* could not be supported by a mere preponderance of the evidence. And on retrial after acquittal, because of error prejudicial to the government, the second trial must be limited to the *civil offense,* and so forth.

93. Where the proceeding has been recognized as essentially civil in substance, if not in form, error prejudicial to the prosecution has been held sufficient for the granting of a new trial after acquittal. United States v. Illinois C. R. Co., 170 Fed. 542 (6th Cir. 1909); United States v. Baltimore & O. S. W. R. Co., 159 Fed. 33 (6th Cir. 1908); Webster v. People, 14 Ill. 365 (1853); People v. Merritt, 91 Ill. App. 620 (1900); Mitchell v. State, 12 Neb. 538, 11 N.W. 848 (1882); State v. Smith, 52 Wis. 134, 8 N.W. 870 (1881); State v. Hayden, 32 Wis. 663 (1873); Horton v. Gwynne, [1921] 2 K.B. 661.

94. An action to recover a penalty for violation of the alien contract labor law is not so far criminal in its nature as to prevent a direction of a verdict in favor of the government. Hepner v. United States, 213 U.S. 103 (1909).

95. A suit for a penalty for a civil offense is not governed by the statute of limitations in regard to criminal prosecutions. Waters-Pierce Oil Co. v. State, 48 Tex.Civ.App. 162, 106 S.W. 918 (1907). *Contra:* Commonwealth v. Equitable Life Assur. Soc., 100 Ky. 341, 38 S.W. 491 (1897).

96. The jurisdiction may provide for the summary trial, without a jury, for a petit misdemeanor even if it is in the true crime category (not to mention the possibility of waiver). The question is whether the constitutional or statutory provisions with reference to juries in criminal trials apply to the trials for civil offenses. It was held that they do not. The Ann, 8 Fed. 923 (D. Md. 1881); People v. Hoffman, 3 Mich. 248 (1854). *Contra:* Rogers v. Alexander, 2 Greene 443 (Iowa 1850).

97. The requirement of confrontation does not apply to the trial of a civil offense. United States v. Zucker, 161 U.S. 475 (1896).